SHAHIDAN SHAFIE

v.

ATLAN HOLDINGS BHD & ANOR & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NOS: W-02-448-2004, W-02-449-2004 & W-02-450-2004]
11 JULY 2005

COMPANY LAW: *Members' rights - Locus standi - Illegal or unlawful acts by company - Whether shareholder had locus standi to challege illegal or unlawful acts of company*

CIVIL PROCEDURE: *Parties - Locus standi - Test for determining locus standi*

COMPANY LAW: *Members' rights - Locus standi - Test for determining locus standi*

CIVIL PROCEDURE: *Striking out - Discretion of court - Whether court may order an amendment instead of striking out a pleading - Circumstances when court should order a pleading struck out - Whether power to direct amendments under O. 18 r. 19 RHC 1980 a separate and distinct power from power to permit amendment under O. 20 RHC 1980*

CIVIL PROCEDURE: *Striking out - Discretion of court - Failure of High Court to consider whether pleading could be saved by amendment - Whether High Court in error - RHC 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Costs - Plaintiff to pay costs - Defendants put to expense by plaintiff - Whether plaintiff obliged to compensate defendants*

CIVIL PROCEDURE: *Amendment - Appellate stage - Whether Court of Appeal empowered to order amendments to pleading on appeal - Rules of the Court of Appeal, r. 76*

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Power of Court of Appeal to order amendments - Rules of the Court of Appeal, r. 76*

Almost 45% of the issued and paid up capital of one Naluri Bhd ('Naluri') came into the hands of Pengurusan Danaharta Nasional Bhd ('Danaharta'). Danaharta entered into an agreement with the second defendant to sell it 220,965,22 shares in Naluri ('the agreement'). Parts of the recitals in the agreement provided that it was in the best interest of the stakeholders of Naluri to proceed with a capital repayment of at least RM690,516,320. The plaintiff was a shareholder of both Naluri and the first defendant, which owned 70% of the second defendant. He took out an originating summons to declare the proposed transaction under the agreement illegal because it amounted to Naluri purchasing its own shares. The defendants each successfully applied to strike out the originating summons. The appeals in the instant case thus arose from the two orders striking out the plaintiff's originating summons for want of a cause of action. The issues for the Court of Appeal's consideration concerned: (i) the plaintiff's *locus standi* to bring the action; (ii) a court's power to amend a pleading instead of striking it out on an application to strike out a pleading; and (ii) the power of the Court of Appeal to permit amendments such as in the instant appeal.

Held (allowing the plaintiff's appeal but with costs to the defendants) Per Gopal Sri Ram JCA:

[1] *Locus standi* in the present instant referred to threshold standing in a private law action. The rule of standing in private law in respect of actions against companies is housed in what is known as the rule in *Foss v. Harbottle* [1843] 67 ER 190. The rule has two limbs. The second limb, relevant to the facts at hand, does not protect illegal or *ultra vires* acts or omissions. In the instant case, the plaintiff sought a declaration against a company of which he was shareholder, that the course of action it had embarked upon was unlawful. It was thus quite clear that the plaintiff had the locus standi to bring the action within the principle in *Edwards v. Halliwell*. *Foss v. Harbottle* [1843] 67 ER 190 (folld); *Edwards v. Halliwell* [1950] 2 All ER 1064 (folld). (p 802 b-g)

[2] When determining whether a particular plaintiff has *locus standi* in a given set of circumstances the court must consider the action in two stages. At the first stage ('the threshold stage'), the court must assume that the fact pattern asserted by the plaintiff is true. Here it does not matter whether the plaintiff may ultimately fail in his action on the merits. Failure or success must be considered at the second stage ('the merits stage'). If a plaintiff is found to lack standing to sue then his action fails *in limine* at the threshold stage. There is no inquiry into the merits of the given case. (pp 802 h & 803 a)

[3] From the opening words of RHC 1980 O. 18 r. 19, it is clear that the court has power on an application, to strike out a pleading or order it to be amended. It does not mean that in every case where an application is made by a party to an action to strike out his opponent's pleading it is obligatory for the court to make an order striking out the pleading in question. The court has a discretion to exercise on the facts of each case whether the particular pleading ought to be struck out as disclosing no cause of action or ordered to be amended. It is only when the court is satisfied that no amendment could be possibly save it ought a pleading to be struck out. The power to direct an amendment vested in the court by O. 18 r. 19 is separate and distinct from the power conferred by O. 20 to permit an amendment on application by a litigant himself. *Kuala Lumpur Finance Bhd v. KGV & Associates Sdn Bhd* [1995] 1 MLJ 504 (refd); *Lim Weow @ Lim Neu v. Perwira Habib Bank Malaysia* [2002] 2 AMR 1307 (refd); *Muniandy s/o Subrayan & Ors v. The Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557 (refd); *Semenanjong Trading Co v. Teoh Cheng Hock* [1963] MLJ 89 (refd). (pp 803 e-h, 804 a & 805 d-e)

[4] In the instant case, the High Court Judge did not at all consider his power under the rule of court to permit or direct an amendment to the originating summons. The Court of Appeal was satisfied that a judicial arbiter in the same circumstances would not have struck out the plaintiff's originating summons in the present case, had she or he applied his or her mind to the facts of the case and the applicable law. The plaintiff had demonstrated that his claim was not demurrable and that it could be saved by means of a suitable amendment to it. The High Court Judge was therefore in error in not considering an amendment under O. 18 r. 19(1) to save the pleading in the instant case. (pp 806 f-g, 807 h & 808 a-c)

[5] The Court of Appeal is by virtue of r. 76 of the Rules of the Court of Appeal vested with all the powers exercisable by the court of first instance, as in this case the High Court. Since the High Court has ample power to permit an amendment, the Court of Appeal also enjoyed similar power. The Court of Appeal will also not permit a litigant to suffer for the mistakes of his lawyers where to correct the error will not produce injustice to the other side. The instant case was a case where by permitting the plaintiff to amend his summons the defendants would suffer no prejudice or harm that could not be remedied by a suitable order as to costs. The Court of Appeal was merely meting out justice according to the substantial merits of the case without regard to technicalities. (p 808 d-h)

[6] The plaintiff had caused the defendants much expense. He had to compensate them for it. Thus although the plaintiff would succeed, he had to pay the defendants the costs of the appeal. (p 809 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Hampir 45% modal berbayar dan modal terbitan syarikat Naluri Bhd ('Naluri') telah jatuh ke tangan Pengurusan Danaharta Nasional Bhd ('Danaharta'). Danaharta memeterai perjanjian dengan defendan kedua bagi menjual 220,965,22 saham Naluri ('perjanjian'). Sebahagian mukaddimah perjanjian memperuntukkan bahawa adalah untuk kebaikan stakeholder Naluri untuk meneruskan dengan pembayaran balik modal berjumlah RM690,516,320, sekurang-kurangnya. Plaintif adalah pemegang saham Naluri dan juga defendan pertama, yang memegang 70% defendan kedua. Plaintif telah memfail saman pemula bagi mengisytiharkan transaksi yang dicadang di bawah perjanjian sebagai tidak sah, sebab ia bererti Naluri membeli saham-sahamnya sendiri. Saman pemula bagaimanapun berjaya dibatalkan oleh defendan-defendan. Pembatalan saman pemula atas alasan ketiadaan kausa tindakan tersebut, yang dibuat melalui dua perintah, telah membangkitkan rayuan-rayuan di sini. Isu-isu yang perlu dipertimbang oleh Mahkamah Rayuan adalah menyentuhi: (i) *locus standi* plaintif untuk membawa tindakan; (ii) kuasa mahkamah untuk meminda pliding dan tidak membatalkannya, walaupun permohonan adalah untuk membatalkan pliding tersebut; dan (iii) kuasa Mahkamah Rayuan untuk membenarkan pindaan dalam keadaan seperti yang wujud dalam rayuan di sini.

Diputuskan (membenarkan rayuan plaintif tetapi dengan kos kepada defendan)

Oleh Gopal Sri Ram HMR:

[1] *Locus standi* dalam rayuan semasa merujuk kepada wibawa puncak dalam tindakan undang-undang persendirian. Kaedah wibawa dalam undang-undang persendirian berkaitan tindakan terhadap syarikat adalah terangkum dalam apa yang dikenali sebagai kaedah *Foss v. Harbottle* [1843] 67 ER 190. Kaedah ini mempunyai dua cabang. Cabang kedua, yang relevan kepada fakta di sini, tidak melindungi perbuatan atau ketinggalan-ketinggalan yang tidak sah atau *ultra vires.* Dalam kes semasa, plaintif memohon deklarasi terhadap sebuah syarikat di mana beliau adalah seorang pemegang saham, iaitu tindakan yang dipilih oleh syarikat itu tidak sah. Ianya dengan itu agak jelas bahawa plaintif mempunyai *locus standi* untuk membawa tindakan di sini dalam ertikata prinsip *Edwards v. Halliwell. Foss v. Harbottle* [1843] 67 ER 190 (diikuti); *Edwards v. Halliwell* (diikuti).

[2] Dalam menentukan sama ada seseorang plaintif mempunyai *locus standi* dalam suatu keadaan kes, mahkamah harus menimbang tindakan dalam dua peringkat. Di peringkat pertama ('peringkat puncak'), mahkamah hendaklah menganggap bahawa corak fakta seperti yang dikemukakan plaintif adalah betul. Di sini, tidak menjadi soal sama ada plaintif akhirnya akan gagal dalam tindakannya di atas merit. Kegagalan atau kejayaan hendaklah dipertimbang di peringkat kedua ('peringkat merit'). Jika seseorang plaintif itu didapati tidak mempunyai wibawa untuk mendakwa, maka tindakannya akan gagal *in limine* di peringkat puncak atau threshhold. Tidak ada siasatan terhadap merit kes berkenaan.

[3] Berdasarkan ungkapan di pembukaan A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980, jelas bahawa mahkamah mempunyai kuasa atas suatu permohonan untuk membatalkan pliding atau memerintah supaya ianya dipinda. Ini tidak bermakna bahawa dalam setiap kes di mana permohonan dibuat oleh satu pihak untuk membatalkan pliding lawannya, mahkamah wajib membuat perintah membatalkan pliding tersebut. Mahkamah mempunyai budi bicara berdasarkan fakta sesuatu kes sama ada untuk membatalkan sesuatu pliding atas alasan ketiadaan kausa tindakan, atau untuk memerintahkan supaya ianya dipinda. Pliding hanya boleh dibatalkan jika mahkamah berpuas hati bahawa ia tidak lagi boleh diselamatkan melalui pindaan. Kuasa untuk memerintahkan pindaan yang ada pada mahkamah melalui A. 18 k. 19 adalah berbeza dari kuasa yang diberi oleh A. 20 untuk membenarkan pindaan atas permohonan oleh pihak yang bertikai itu sendiri. *Kuala Lumpur Finance Bhd v. KGV & Associates Sdn Bhd* (dirujuk); *Lim Weow @ Lim Neu v. Perwira Habib Bank Malaysia* (dirujuk); *Muniandy s/o Subrayan & Ors v. The Chairman & Board Members of Koperasi Menara Maju Bhd* (dirujuk); *Semenanjong Trading Co v. Teoh Cheng Hock* [1963] MLJ 89.

[4] Dalam kes semasa, hakim Mahkamah Tinggi langsung tidak menimbang kuasanya di bawah kaedah mahkamah untuk membenar atau memerintahkan pindaan terhadap saman pemula. Mahkamah Rayuan berpuas hati bahawa seorang pengadil kehakiman dalam keadaan yang sama tidak akan membatalkan saman pemula plaintif dalam kes semasa, sekiranya beliau mengarahkan fikirannya kepada fakta-fakta kes serta undang-undang yang terpakai. Plaintif telah membuktikan bahawa tuntutannya bukanlah sesuatu yang tidak dapat bertahan dan bahawa ia memang boleh diselamatkan melalui pindaan yang sesuai. Hakim Mahkamah Tinggi dengan itu tersilap kerana tidak mempertimbang suatu pindaan di bawah A. 18 k. 19(1) bagi menyelamatkan pliding dalam kes semasa.

[5] Berdasarkan k. 76 Kaedah-Kaedah Mahkamah Rayuan, semua kuasa-kuasa yang boleh dilaksanakan oleh mahkamah pertama, iaitu Mahkamah Tinggi di sini, turut terletakhak kepada Mahkamah Rayuan. Oleh kerana Mahkamah Tinggi mempunyai kuasa yang luas untuk membenarkan pindaan, maka Mahkamah Rayuan juga memiliki kuasa yang serupa. Mahkamah Rayuan juga tidak akan membenarkan seseorang litigan mendapat kesusahan atas kesilapan peguamnya di mana membetulkan kesilapan tidak membawa kepada apa-apa ketidakadilan di pihak yang lain. Kes semasa adalah satu kes di mana, dengan membenarkan plaintif meminda samannya, defendan tidak menanggung apa-apa prejudis atau kerugian yang tidak boleh dipampas dengan suatu perintah sesuai berhubung kos. Mahkamah Rayuan hanya melaksanakan keadilan menurut merit penting kes tanpa menghiraukan soal-soal teknikal.

[6] Plaintif telah menyebabkan defendan menanggung perbelanjaan yang besar. Untuk itu, beliau harus mempampasi defendan. Oleh itu, walaupun plaintif berjaya, beliau harus membayar defendan kos rayuan ini.

Case(s) referred to:

Bandar Builder Sdn Bhd v. United Malayan Banking Corp Bhd [1993] 3 MLJ 36 ***(refd)***

Edwards v. Halliwell [1950] 2 All ER 1064 ***(foll)***

Foss v. Harbottle v. Harbottle [1843] 67 ER 190 ***(refd)***

Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86 ***(refd)***

K Abdulkhadar v. The Plantation Corporation of Kerala AIR [1983] Ker 1 ***(refd)***

Kuala Lumpur Finance Bhd v. KGV & Associates Sdn Bhd [1995] 1 CLJ 519 HC ***(refd)***

Lim Weow v. Perwira Habib Bank Malaysia Bhd [2001] 2 AMR 1307 ***(refd)***

Muniandy Subrayan & Ors v. The Chairman & Board Members of Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA ***(refd)***

Re Exchange Banking Co [1882] 21 Ch D 519 ***(refd)***

Republic of Peru v. Peruvian Guano Company [1887] 36 Ch D 489 ***(refd)***

Semenanjong Trading Co v. Teoh Cheng Hock [1963] MLJ 89 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 64

Contracts Act 1950, s. 24(d)

Courts of Judicature Act 1964, s. 44

Rules of the Court of Appeal 1994, r. 76

Rules of the High Court 1980, O. 18 r. 19(1)(a), O. 20, O. 25 r. 4

Other source(s) referred to:

Malaysian High Court Practice 2001, para 18.19.2

(Civil Appeal No: W-02-448-2004)
For the appellant - Lim Kian Leong (Low Chi Cheng, Tan Shin Shin & Wong Chun-Keat with him); M/s Lim Kian Leong & Co
For the 1st respondent - Tommy Thomas (K Kirubakaran with him); M/s Kiru & Yong
For the 2nd respondent - Joseph Yeo; M/s Joseph Yeo

(Civil Appeal No: W-02-448-2004)
For the appellant - Lim Kian Leong (Low Chi Cheng, Tan Shin Shin & Wong Chun-Keat with him); M/s Lim Kian Leong & Co
For the respondent - Tommy Thomas (K Kirubakaran with him); M/s Kiru & Yong

(Civil Appeal No: W-02-448-2004)
For the appellant - Lim Kian Leong (Low Chi Cheng, Tan Shin Shin & Wong Chun-Keat with him); M/s Lim Kian Leong & Co
For the respondent - Joseph Yeo; M/s Joseph Yeo

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D7-24-94-2004]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram JCA:

On 10 January 2005 we were moved in Civil Appeal No. W-02-448-2004 for interim preservation orders by way of a number of injunctions under s. 44 of the Courts of Judicature Act 1964 pending the disposal of these appeals. I do not propose to recite here the relief sought on the motion. They are not relevant. What is relevant is that we thought it best that these appeals be heard on merits as that would render the applications academic. Accordingly we adjourned the motions to 18 January 2005 and directed the appeals to be fixed on that date. Counsel on both sides on each of these appeals agreed to this course.

I must say a few words about these appeals. They all concern two orders made by the High Court striking out an originating summons for want of a cause of action. Two orders because each of the two defendants filed a separate summons to strike. The third appeal (Civil Appeal 448/2004) was unnecessarily brought. It is aimed at the consequential order by the High Court dismissing the originating process. In the ordinary way that order merges with the order striking out the process and so no separate appeal need be directed it. Now, as for the substantive appeals against the striking out orders, it is necessary to hearken to some of the factual background.

Naluri Berhad ("Naluri") is a very rich public company whose shares are listed on the Stock Exchange. At one point in time it had RM900 million in its hands. Nevertheless, the Stock Exchange designated it as a "PN 10 company". "PN 10" means Practice Note 10. It is a practice note issued by the Stock

Exchange. It is aimed at companies which the Exchange considers to have an inadequate level of operations. Almost 45% of the issued and paid up capital of Naluri came into the hands of Pengurusan Danaharta Nasional Bhd ("Danaharta"). Danaharta is the statutorily incorporated company formed to rescue banks from bad debts owed them by their customers in consequence of the financial crisis that hit this country in 1997. Danaharta then appointed Special Administrators over the affairs of Naluri. Mr. Thomas who appeared for one of the respondents drew our attention to several provisions of what I will call for short, the Danaharta Act which deal with what special administrators can and cannot do. I do not propose to go through all the sections here. Suffice to say that from a reading of the provisions, these special administrators are persons with very wide powers. It appears that they can do almost anything they like with the assets of the company over which they are appointed. They need no sanction from the court to act contrary to several important provisions of the Companies Act 1965. They appear to be insulated from any consequence for their acts and omissions. But, as pointed out to learned counsel during argument, neither Danaharta nor the special administrators are parties to the proceedings. And no relief whatsoever is being claimed against them.

On 11 August 2003, Danaharta entered into an agreement with the second defendant, Atlan Properties Sdn Bhd under which it sold the latter, 220,965,222 shares in Naluri. These shares came into Danaharta's hands in its capacity as chargee. It was pursuant to the exercise of its power to sell as chargee that it made the sale to the second defendant.

Now, some of the recitals in the agreement are important. This is what they say:

> (E) On 18 April 2003 Alliance Merchant Bank Berhad on behalf of the Company [that is to say, Naluri] announced that the Special Administrators had determined that it was in the best interest of the stakeholders of the Company to proceed with a capital repayment of at least RM 690,516,320.00 on the basis of RM 1.00 for each existing share of RM 1.00 each in the Company. It was also announced that the Company had received a notice from the Kuala Lumpur Stock Exchange that the Company was determined to have an inadequate level of operations within the meaning of Practice Note No. 10/2001 of the Listing Requirements of the Kuala Lumpur Stock Exchange.
>
> (F) Pursuant to certain facility/loan agreements entered into between a .borrower ("Borrower") and the lenders named therein ("Lenders") the Lenders agreed to make available to the Borrower a loan facility ("Loan"), which repayment thereof was secured by a charge over, among other things, Three Hundred Nine Million Six Hundred Forty Eighty Thousand (309,648,000) fully paid ordinary shares of RM 1.00 each in the Company ("Charged Shares").

(G) The rights, title and interest of the Lenders in and under the loan and security documents in relation to the Loan ("Relevant Documents") have been vested in the Vendor, Danaharta Urus Sdn Bhd (Company No. 476316-T) and Danaharta Managers Sdn Bhd (Company No. 471238-A) pursuant to Section 14 of the Danaharta Act. The Vendor has been duly authorised by Danaharta Urus Sdn Bhd and Danaharta Managers Sdn Bhd to act for them in respect of the transactions contemplated herein.

(H) The Borrower has defaulted in his repayment of the amounts owing under the Loan and the right to enforce the rights under the Relevant Documents, including the power of sale, has thereby arisen.

The plaintiff is a shareholder of both Naluri and Atlan Holdings Bhd, the first defendant, which owns or controls about 70% of the second defendant's shareholding. He took out an originating summons, in essence, asking the court to declare that the transaction that was to be carried out under the agreement in question was illegal because it amounted to Naluri purchasing its own shares. The defendants, although related to each other, were separately represented. As I have already said, each successfully applied to strike out the action. The plaintiff appealed to us.

After hearing argument on the appeal we were satisfied that the originating summons as framed before the judge did indeed disclose no cause of action. However, it occurred to us that in the light of the way O. 18 r. 19(1) of the Rules of High Court 1980 ("RHC") is framed and in view of the several leading authorities on the subject (which I will refer to later in this judgment), the learned judge ought to have proceeded further and considered whether the pleading was incapable of being saved by amendment. Accordingly we granted the plaintiff time to formulate an amendment that would save the pleading from being demurrable. When these appeals came before us on 4 February 2005, learned counsel for the plaintiff produced to us an amendment that he had formulated asking for a declaration that the return of Naluri's capital to its shareholders was in breach of s. 64 of the Companies Act 1965 because no sanction from the court had been obtained. However, Mr. Thomas was able to demonstrate, by reference to several provisions of the Danaharta Act, such a reduction as happened here could be effected by Danaharta without any prior court approval. Mr. Thomas' other equally strong argument is that this is not a case of return of Naluri's share capital to its shareholders because what was being distributed was the income Naluri had derived from disposing shares in Malaysia Airlines that it had previously owned. I consider these arguments to be unanswerable. But, the question that requires consideration, in this context, is whether the originating summons in this case is incapable of being saved by any amendment available to the plaintiff on the undisputed

facts of this case. The other questions that have to be dealt with in this appeal are, first, the plaintiff's standing to bring the action and, second, the power of this court in an appeal of this nature.

Let me take the *locus standi* issue first. *Locus standi* in the present instance refers, of course, to threshold standing in a private law (as opposed to a public law) action. The rule of standing in private law, in respect of actions against companies is housed in what has come to be called as the rule in *Foss v. Harbottle* [1843] 67 ER 190. That rule has two limbs. The first limb is not relevant to the facts of this appeal. However, the second limb is relevant. And the second limb is

> that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting. (per the joint judgment of the English Court of Appeal in *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at p 357.

The point that requires to be noted at once is that illegal or ultra vires acts or omissions are not protected by the second limb. That an individual shareholder has standing to challenge illegal or *ultra vires* acts was settled beyond doubt by the decision in *Edwards v. Halliwell* [1950] 2 All ER 1064 where Jenkins LJ said:

> The cases falling within the general ambit of the rule [ie, the rule in *Foss v. Harbottle*] are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority.

The position here is that the plaintiff seeks a declaration against a company of which he is a shareholder that the course of action it has embarked upon is unlawful. It seems to me quite clear on that statement of fact that the appellant has *locus standi* to bring this action within the principle in *Edwards v. Halliwell.* I would therefore resolve the first issue in the appellant's favour. Before I move to the second issue there is a proposition central to the determination of *locus standi*. It is this. When determining whether a particular plaintiff has *locus standi* in a given set of circumstances the court must consider the action in two stages. At the first stage ("the threshold stage") assume that the fact pattern asserted by the plaintiff is true. It is just like a case of striking out a pleading for want of a cause of action or defence under RHC O. r. 19(1)(a) where the court is confined to the pleading and not to extrinsic matters. It does not matter whether the plaintiff may ultimately fail

in his action on the merits. Failure or success must be considered at the second stage ("the merits stage"). If a plaintiff is found to lack standing to sue then his action fails in limine at the threshold stage and there is no inquiry into the merits of the given case.

With that I consider the second issue. This has to do with the power of a court when an application is made to it under RHC O. 18 r. 19. It is best that I remind myself about what that rule of court says:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

You will see from the opening words of the rule that the court has the power, on an application to strike out a pleading or order it to be amended. This is an important choice that the court has. It does not therefore mean that in every case where an application is made by a party to an action to strike out his opponent's pleading it is obligatory for the court to make an order striking out the pleading in question. The court has a discretion to exercise on the facts of each case whether the particular pleading ought to be struck out as disclosing no cause of action or ordered to be amended. It is only when the court is satisfied that no amendment could possibly save it ought a pleading to be struck out. At least three cases illustrate the width of the power which a court has in this regard.

First, in *Kuala Lumpur Finance Bhd. v. Kgv & Associates Sdn. Bhd.* [1995] 1 CLJ 519, Shaik Daud J (later JCA) refused an application to strike out a statement of claim on the ground that it could be saved by an amendment. He said:

> It is also settled law that the mere fact that the case is weak and unlikely to succeed is no ground for the striking out and also where the pleadings can be amended, leave under the rule to amend will almost always be given. In other words if there are defects in the pleadings resulting in the other party applying to strike out, and if an amendment can correct the defect, the courts generally would not act summarily.

The second case is *Lim Weow @ Lim Neu v. Perwira Habib Bank Malaysia Berhad* [2001] 2 AMR 1307 where Rahmah Hussain J followed *Kuala Lumpur Finance Bhd. v. Kgv & Associates Sdn. Bhd.* Lastly, there is *Muniandy s/o Subrayan & Ors v. The Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 CLJ 417, which is a decision of this court. In that case, the High Court had struck out a statement of claim on the ground that certain statutory compliance had not been pleaded by the plaintiff. On appeal Shankar JCA said this:

> With all due respect to the trial judge, if he thought that it was imperative that the statement of claim should plead compliance, (notwithstanding that the fact of compliance was already on record by way of an agreed document), **he should have directed that the claim be amended**. Striking out pleadings under O. 18 r. 19 of the Rules of High Court 1980 is a discretionary power to be exercised according to the justice of the case. (emphasis added.)

I think that I should also mention the older case of *Semenanjong Trading Co v. Teoh Cheng Hock* [1963] MLJ 89. In that case, the plaintiffs were the owners and the consignees of certain bags of tea dust which had been jettisoned by the master of a vessel in order to save the vessel and the rest of the cargo. When the vessel arrived in Penang, the defendants who were agents of the vessel delivered the remaining cargo to the respective consignees without obtaining the general average contribution due from each of them or any adequate security in lieu thereof. The plaintiff brought an action against the defendant based on these facts and alleged that by reason of the defendant's acts, the defendant had lost the lien over the remaining cargo which it would have otherwise had and that in consequence thereof the plaintiff had suffered damage. The defendant applied under O. 25 r. 4 (the precursor to O. 18 r. 19(1)) to strike out the claim on the ground that it did not disclose a cause of action, *inter alia*, because the statement of claim did not specify whether the claim was founded in contract or tort. Hepworth J made no order on the defendant's summons save as to costs. He said:

> The plaintiff alleges that owing to the negligence of the defendant as the agent of the shipowner he has suffered damage. He is in effect alleging that the defendant should have refused to deliver the cargoes to the consignees unless they paid or agreed to pay general average and in failing to do so has been guilty of negligence.
>
> The plaintiff concedes, however, that negligence has not been clearly pleaded in the statement of claim, but submits that this can be cured by amendment and counsel for the plaintiff stated that he would be prepared to undertake to apply for leave to amend the statement of claim within a specified time.

The defendant says in reply that the claim is for general average contribution, that it is framed in contract (see Form 71 in Volume 5 of *Atkin's Encyclopaedia of Court Forms and Precedents*), and that the plaintiff has no claim in tort.

I do not think that at this stage I am concerned with whether or not the plaintiff has a good claim in tort, any more than I would be concerned at this stage with the fact that a case is weak and unlikely to succeed or that a claim appears to be barred by some statutory defence as, for example, limitations. (See *Mallal's Supreme Court Practice,* Volume I, page 319). **In my view the statement of claim can be amended so as to make it clear to the defendant what the case is that he has to answer and what the issue is that has to be tried.**

Subject to the plaintiff applying for leave to amend the statement of claim within 21 days from today there will be no order on the summons, except that the costs of and incidental to this application shall be taxed and paid by the plaintiff to the defendant. (emphasis added.)

As may be seen, the plaintiff there was given time to put his pleaded case in order. *Semenanjong Trading Co v. Teoh Cheng Hock* merely illustrates the settled practice of the court not to strike out a pleading that can be saved by amendment. I may add that the Malaysian High Court Practice 2001, para. 18.19.2 states that the power to amend conferred by O. 18 r. 19 is in addition to the power to amend available under O. 20. The editors cite *Semenanjong Trading Co v. Teoh Cheng Hock* as authority for this proposition. After careful reflection, I think that the proposition is correct. In my judgment, the power to direct an amendment vested in the court by O. 18 r. 19 is a separate and distinct power conferred by O. 20 to permit an amendment on application by a litigant in that behalf.

There are several examples cited in the English Supreme Court Practice 1991 to illustrate the settled practice of the court not to strike out a pleading unless no amendment can save it. Take the case of *Republic of Peru v. Peruvian Guano Company* [1887] 36 Ch D 489. There you find Chitty J, the acknowledged master of practice and procedure saying this:

Then comes the question whether the action should be dismissed. The notice of motion does not ask in terms for the dismissal of the action, but it does ask for such other order as may be proper, and there seem to me to be two reasons why I should dismiss the action. First, **the pleader has made the best of his case, I am satisfied that he could not state it better than he has stated it.** Then the Plaintiffs are still deliberately retaining the money. It is a very different thing to offer to bring the money into account and keeping this large sum, as I have said, in their treasury, or, having spent it for the purpose of the Republic, and refunding it or bringing it into Court. There is no offer even now made as I understand it.

Romer, Q.C.:-No, my Lord.

> It was not then by inadvertence that the offer was omitted. Not only is there no such offer, but the Plaintiffs now deliberately refuse to make it. The result, therefore, I think is that no good can come of this litigation, and that in accordance with the jurisdiction conferred upon me by the rule, I ought now summarily to put an end to the thing. I therefore strike out the claim … (emphasis added.)

In *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, at p. 94, Lindley MR when dealing with a case of slander of goods said this:

> [T]he circular complained of is such as plainly to constitute no cause of action even if all the allegations in the statement of claim are true. … and as **there is no reason to suppose that the plaintiffs can improve their case by any amendments** they can make, the Court ought to exercise the power conferred upon it by Order xxv, r. 4, and order judgment to be entered for the defendants. (emphasis added.)

It seems to me that the authorities that I have discussed in brief thus far show that a court ought not to strike out an originating process or pleading unless it cannot be saved by any amendment whatsoever based on the available facts. That, of course, is another way of saying that it is only in a plain and obvious case that a pleading will be struck out as not disclosing any cause of action. Because, a pleading that may be saved by amendment is not a plain and obvious case that should be struck out.

It is quite apparent in the present instance that the learned judge did not at all consider his power under the rule of court to permit or direct an amendment to the originating summons. No doubt the learned judge did not give any reasoned judgment for his decision in this case. But I have not found myself hampered by the want of a written judgment. Having scrutinised the record provided to the court, I am satisfied that a judicial arbiter in the same circumstances would have not struck out the plaintiff's originating summons in the present case had he or she applied his or her mind to the facts of this case and the applicable law. Had the learned judge addressed his mind to his power under O. 18 r. 19(1) to direct an amendment, he would not have struck out the plaintiff's originating summons for want of a cause of action under sub-paragraph (a) of that rule.

Now, here is a case where there is a challenge to the validity of an agreement entered into by a company of which the plaintiff is a shareholder. The challenge is on grounds of illegality. Even if the present proposed amendment does not assist the plaintiff it appears to me that there is a plea of illegality on other grounds but on the same facts fairly available for the plaintiff to take. There

is no doubt that the agreement in this case between Danaharta and the second defendant has as part of its consideration – indeed it appears to be a condition of that agreement – that Naluri shall refund a large part of its capital to its shareholders. In other words, the creditors of Naluri – and there does not appear to be any dispute that it did have creditors – would be deprived of the right to execute against those monies returned to Naluri's members. It is a well established principle that the creditors of a limited company have protection against the company dissipating its capital except in the ordinary course of its business. As Sir George Jessel MR said in *Re Exchange Banking Co* [1882] 21 Ch D 519, 533:

> The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he cannot enforce otherwise than on a winding up.

It is based on this principle that the law governing voluntary obligations strikes down bargains that are entered into with the object or purpose of defeating or defrauding creditors. Section 24 of the Contracts Act 1950 houses this doctrine. That section reads:

> 24. The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another, or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

It would appear that the plaintiff in the instant appeal may well be able to bring the facts of his case within s. 24(d). After all, this is a case of an agreement that – to use the words of paragraph (d) – "involves or implies injury to the property of another", namely, Naluri's creditors. It may be that the plaintiff may eventually fail after the High Court has had the benefit of mature argument and a consideration of the relevant authorities, including the

decision of the Kerala High Court in *K Abdulkhadar v. The Plantation Corporation of Kerala* AIR 1983 Ker 1. However, it is my judgment that at this stage of the proceedings that the plaintiff has demonstrated that his claim is not demurrable and that it can be saved by means of a suitable amendment to it. It may be added for good measure that it is not the function of a court on a striking out application to undertake a minute examination of the documents and facts of the case in order to see whether a plaintiff has a cause of action or a defence. (See, *Bandar Builder Sdn Bhd v. United Malayan Banking Corp Bhd* [1993] 3 MLJ 36.) Further, it is entirely possible that after a careful consideration of the documentary material the High Court may well direct the action to proceed as if commenced by writ. Far be it for this court to predict how the High Court will approach the trial of the action on merits. All I am prepared to say at this stage, based on the authorities already discussed, is that the learned judge fell into error in not considering an amendment under O. 18 r. 19(1) to save the pleading in this case.

Now for the last point. Although he did not pursue it with any vigour or enthusiasm in his oral argument, Mr. Thomas has in his written submission suggested that it would be wrong for us at the appellate level to see if the plaintiff's summons can be saved by amendment. With respect I cannot agree for two reasons. In the first place, we as the Court of Appeal are by virtue of r. 76 of the Rules of the Court of Appeal, vested with all the powers exercisable by the court of first instance, in this case the High Court. It is axiomatic therefore that since the High Court has ample power to permit an amendment, we too enjoy the like power. In the second place, we have said it often enough that we will not permit a litigant to suffer for the mistakes of his lawyers where to correct the error will not produce injustice to the other side. Now, this is a case where by permitting the plaintiff to amend his summons, the defendants will suffer no prejudice or harm that cannot be remedied by a suitable order as to costs. They will still have their day in court. And they might even succeed again. But consider for a moment the plaintiff's position. He will forever be shut out from his chance at receiving justice. Therefore weighing these two opposing factors on a balance I find the tilt to be in the plaintiff's favour. The suggestion that the court is here rushing to the assistance of the plaintiff is completely misconceived. All that we are doing is meting out justice according to the substantial merits of the case without regard to technicalities. And that, I think, is why we exist as a constitutional institution.

For the reasons already given I would allow this appeal and set aside the orders made by the court below save the order as to costs. The originating summons is restored to file and remitted to the High Court. The plaintiff shall, within 14 days from the date of this order deliver an amended originating summons seeking the appropriate declarations of illegality and *ultra vires*.

Now a word about costs. That there was an arguable cause of action was staring the plaintiff in his face. Instead of pursuing this viable course, he was about a merry chase of ghosts and ghouls that never existed. He has in the process caused the defendants much expense. He must compensate them for it. Therefore, although the plaintiff succeeds here, he must pay to the defendants the costs of this appeal. The defendants will therefore receive the costs incurred here and in the court below. The deposit will be paid out to the first defendant.

My learned brothers Richard Malanjum and Hashim bin Dato' Yusoff JJCA have seen this judgment in draft and have expressed their agreement with it.